IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-157

UNITED STATES OF AMERICA,

PETITIONER,

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether substantial evidence exists to show gross disproportionality in charging African-Americans with crack offenses supporting a claim of unconstitutional selective prosecution.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit organization whose membership consists of more than 8,000 lawyers and more than 28,000 affiliate members, including citizens of every state. The lawyer members of NACDL include advocates, law professors, and judges. NACDL is the only private bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

NACDL is dedicated to the preservation and improvement of our adversary system of justice. Among NACDL's stated objectives are the promotion of the proper administration of criminal justice, the protection of individual rights, and the improvement of criminal law, its practices, and its procedures.

NACDL has appeared as amicus curiae in many cases addressing issues arising out of the administration of federal criminal law, including issues implicating due process, equal protection, Eighth Amendment concerns, discovery procedures, and sentencing matters. NACDL believes the issue presented here is of great significance to the criminal justice system because the decision below provides for basic discovery procedures and remedies for the failure to abide by those procedures, which in turn aid in ensuring protection of important constitutional rights including due process and equal protection. NACDL believes that the Court will benefit from its views on this important issue.

Petitioner and respondents have consented to the filing of this brief and letters reflecting those consents will be lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The issue before the Court may narrowly be viewed as whether the court of appeals was correct in affirming the district court's order for discovery and dismissal of the indictment upon the government's refusal to comply. Resolution of that issue, however, must consider the larger context of this nation's drug laws and their enforcement. Defendants before the Court were charged with offenses involving crack cocaine. The structure of law enforcement, prosecution, and sentencing in crack cases must be considered to reach a just resolution.

The severe statutory penalties for crack cocaine are not supported by scientific or social realities. The penalties for crack offenses are substantially more severe than for other drug offenses, including those involving powder cocaine. Combined with the misperception that crack offenses are committed primarily by African-Americans, the end result is that investigative and prosecutorial efforts impermissibly target African-Americans.

Crack is a form of cocaine produced by combining cocaine powder, water and some agent such as baking soda. When heated the cocaine crystallizes into "rocks" which are administered by smoking. The production process takes only a few minutes. Evidence indicates that, although there are some differences in the physiological effects of various means of ingesting cocaine (e.g., smoking, snorting, intravenous), the effects, both in terms of duration and potency, are essentially similar.

Despite the similarities of crack and powder cocaine, crack is punished 100 times more severely than powder. The misperceptions that crack offenses are more serious than powder cocaine offenses and that African-Americans commit crack offenses to a significantly greater extent than whites have several repercussions. More than 90% of federal crack defendants are African-American. When coupled with the disparity in applicable sentencing statutes and guidelines, the end result is that African-Americans are sentenced to substantially longer terms of imprisonment for offenses involving what is essentially the same drug: cocaine.

Defendants across the country have mounted various attacks on the statute, guidelines, and practices of law enforcement and prosecutors. Although some district courts have ruled in favor of

defendants, the courts of appeals, applying a rational basis analysis, have uniformly held that the prosecutorial decisions and the sentencing statutes do not violate the Constitution. With respect to claims of selective enforcement and prosecution in violation of equal protection and due process, courts have consistently concluded that defendants have failed to present evidence of race-based decisions by prosecutors.

Given the climate created by the disparate sentencing treatment of crack and cocaine powder and the disproportionate number of African-Americans prosecuted compared to whites, a colorable claim of improper prosecutorial decisions has been made. Nothing more is, or should be, required for discovery relating to the processes by which these decisions are made. This is particularly true given that the government holds the key to the very evidence the various courts have held to be missing.

ARGUMENT

SUBSTANTIAL EVIDENCE EXISTS TO SHOW GROSS DISPROPORTIONALITY IN CHARGING AFRICAN-AMERICANS WITH CRACK OFFENSES SUPPORTING A CLAIM OF UNCONSTITUTIONAL SELECTIVE PROSECUTION.

Crack cocaine and powder cocaine are essentially the same drug, but the penalties for crack offenses are significantly harsher. African-Americans are disproportionately represented in federal cases involving crack offenses. The statistical evidence of disproportionate prosecutions is sufficient to require discovery of the process by which decisions to prosecute are made.

I. THE CONTEXT OF CRACK PROSECUTIONS

A. CRACK COCAINE AND POWDER COCAINE ARE ESSENTIALLY THE SAME DRUG.

Although the terms "crack" and "cocaine base" are often used interchangeably, crack is in fact only one form of cocaine base, which in turn is only one form of cocaine. See, e.g., United States Sentencing Commission Special Report to the Congress: Cocaine and Federal Sentencing Policy, Feb. 1995 at 12-15 [hereinafter Special Report]. Powder cocaine is produced by dissolving coca paste from coca leaves in hydrochloric acid and water. Potassium salt causes undesired substances to solidify and they are then removed. Finally, ammonia is added to separate the powder cocaine from the solution. The result is cocaine hydrochloride.

Production of cocaine base involves removing the salts added during powder production and returning the substance to essentially a form similar to the coca paste. One method is known as freebase. The powder is dissolved in an alkaloid solution. Various solvents, often ether, are added, producing the solid cocaine base. Because of its complex and dangerous production, freebasing has been largely abandoned.

Crack cocaine is a form of cocaine base that is cheaper, easier, and safer to produce than freebase. Powder cocaine is dissolved in a solution of water and baking soda and boiled. A solid substance forms, which is allowed to dry and then broken into "rocks". The "rocks" are then distributed. Dealers often keep the drug in its powder form and convert it to crack only shortly before distribution.

Powder cocaine is administered by injection, insufflation (snorting), or ingestion. Crack cocaine is used by inhalation (smoking). The major

difference in the effects of the two forms of cocaine, powder and crack, is the speed of physiological and psychotropic effects. Smoking crack results in much more rapid entry to the brain and subsequent effects than does the use of powder cocaine. The type, duration and quality of the effects are similar. Special Report at 22-29 & Table 2.[1]

B. THE DIFFERENCES IN SENTENCING

1. Despite the evidence that crack cocaine and powder cocaine are essentially the same drug, Congress and the Sentencing Commission continue to maintain penalties for crack that are grossly disproportionate to powder penalties. Federal law mandates a minimum term of imprisonment of ten years for a violation involving five kilograms of powder. 21 U.S.C. §841(b)(1)(A). Only 50 grams of crack trigger the ten-year mandatory minimum. Similarly 21 U.S.C. §841(b)(1)(B) provides for a five-year minimum term of imprisonment for 500 grams of powder cocaine, but only 5 grams of crack. A five-year mandatory minimum also applies to simple possession of 5 grams of crack cocaine. 21 U.S.C. §844. Section 844 also provides a five-year mandatory minimum penalty for possessing lesser quantities with prior convictions.[2]

Because the Sentencing Guidelines are driven by the statutory penalties for controlled substances, the guidelines also treat quantities of crack the same as 100 times a similar quantity of powder

[1]One district court found the substances, crack and powder, chemically identical and that the different penalties were thus not supported. United States v. Davis, 846 F. Supp. 1303 (N.D. Ga. 1994).

[2]Other drugs carry a 15-day mandatory minimum for simple possession for an offender who has a prior controlled substance conviction.

cocaine. See U.S.S.G. § 2D1.1(c). For example, a base offense level of 32 applies for 5 to 15 kilograms of powder cocaine. Only 50 to 150 grams of crack results in the same offense level.

Thus, two defendants with the same quantity of cocaine, one with powder and one with crack, will receive significantly different sentences. A defendant with 50 grams of powder cocaine will face no statutory mandatory minimum sentence while a defendant with 50 grams of crack will face a mandatory minimum ten-year term of incarceration. 21 U.S.C. § 841(b)(1)(A). Under the United States Sentencing Guidelines, the base offense level for the powder offender would be 16, but that of the crack offender would be 32. Assuming a Criminal History II for each offender and no mitigating or aggravating factors that would adjust the offense level, the powder offender would have a sentencing range of 24-30 months, while the crack offender would face 135-168 months in prison.

2. These penalties, with the 100 to 1 ratio, were born in the Anti-Drug Abuse Act of 1986. At the time, Congress essentially reacted to news stories of crack distribution in the inner cities and "crack babies" as well as unverified and exaggerated reports concerning the effects of crack and the alleged violence arising from its use. See Hearings before the United States Sentencing Commission on Proposed Guidelines Amendments for Public Comment, Testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation (Mar. 22, 1993) (process described as "frenzied" and "extraordinary") [hereinafter "Sterling Testimony"]. See also 132 Cong. Rec. S13748 (remarks of Sen. Evans) ("the action over there resembled a Congressional lynch mob more than it did careful legislation").

Typically, such major legislation on serious crime issues would be "referred to a subcommittee, and hearings [would be] held on the bills." Additionally, comments would be invited from "the Administration, the Judicial Conference, and organizations that have expertise on the issue." Instead, the 1986 Act was passed a mere five weeks after introduction with only one brief committee hearing. Sterling Testimony; "Crack" Cocaine: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Cong. 2d Sess. (July 15, 1986). The original proposal offered by the Democrats, in an effort to look "tough on crime," called for a 50 to 1 sentencing ratio between crack and powder cocaine. See H.R. 5394; Sterling Testimony at 4. But, not to be outdone, the Republicans "arbitrarily doubled [the ratio] simply to symbolize redoubled congressional seriousness." Sterling Testimony at 4.

3. In testimony before the United States Sentencing Commission, several witnesses stated the 100 to 1 ratio was not supported by the nature of crack cocaine production and distribution, nor by the pharmacological nature of the drug. See, e.g., U.S. Sentencing Commission, Hearing on Crack Cocaine, Nov. 9, 1993, at 38 [hereinafter "Commission Hearings"] (testimony of Sergeant Brennan) ("[y]ou don't see very much powder on the street at all, no. The powder is made into crack and distributed on the street. . . . It all comes from the same source: the powder."); (testimony of Jerome Skolnick) ("dealers . . . are dealing in powder cocaine. So that distinction just is not a sensible distinction").

Furthermore, crack has never been shown to cause the user to become more prone to violence than powder cocaine. See Commission Hearings at 52 (testimony of Dr. Belenko) ("there is no clear

evidence . . . that the emergence of crack had any kind of gross effect on violent crime rate"). See also Hope Corman, Theodore Joyce and Naci Mocan, "Homicide and Crack in New York City," Searching For Alternatives: Drug-Control Policy in the United States (Hoover Institution Press 1991) at 112, 134 (study of correlation between violent crime and crack cocaine found "only weak evidence of any significant upturn" in violent crimes and concluded that crack is conveniently used to cover up more fundamental causes of violence). "Thus media and public fears of a direct causal relationship between crack and other crimes do not seem confirmed by empirical data." Commission Hearings at 59 (testimony of Dr. Belenko).

In sum, "Congress had no hard evidence before it to support the contention that crack is 100 times more potent or dangerous than powder cocaine." United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); see also 132 Cong. Rec. S9788 (daily ed. July 29, 1986)("the dividing line between crack and powder cocaine is indistinct and arbitrary"). As one doctor concluded, "it doesn't make sense to punish a molecule with a little twist so much more severely than the same molecule in a different scenario[,]. . . and the potential bias for punishing crack cocaine differently than cocaine hydrochloride is a bias towards inner-city America." Commission Hearings at 179 (testimony of Dr. Robert S. Hoffman).

The Sentencing Commission concluded that the 100 to 1 ratio of crack to powder cocaine is too great. See Special Report, Executive Summary at p. I. The Commission found that neither powder nor crack cocaine are physically addictive but both are psychologically addictive. Id. at 181. Most cocaine-related emergency room admissions are related to smoking crack, but most deaths result from injection of powder. Id. at 184. Of

particular interest is the finding that any difference in the association of crack with violent crimes is "systemic." That is, the crime is related to the methods and areas of marketing and distribution and not to the effects of usage. Id. at vii-ix, 185.[3]

4. The 100 to 1 ratio flies in the face of the general policies of drug enforcement. Courts have found that Congress intended a "market approach" to punishment for drug offenses. This approach focuses "on major traffickers responsible for dealing in very large quantities." United States v. Osburn, 955 F.2d 1500, 1507 (11th Cir.), cert. denied, 113 S. Ct. 223 (1992); see also United States v. Lee, 957 F.2d 778, 783 (10th Cir.), cert. denied, 113 S. Ct. 475 (1992); United States v. Savinovich, 845 F.2d 834, 839 (9th Cir.), cert. denied, 484 U.S. 1058 (1989).

In theory, this "market approach" should punish more severely not only offenders dealing in large quantities, but also those dealing in controlled substances with greater monetary value. However, because the methods of distributing crack and the practices of law enforcement result in prosecution of relatively small-scale street dealers who nonetheless receive draconian sentences, this vaunted market approach is turned on its head.

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[3]Congress chose to maintain the disparities even in light of the scientific evidence that the drugs are essentially the same and growing evidence that the sentencing scheme unfairly punishes African-Americans more severely than whites. After extensive hearings and debate, the United States Sentencing Commission proposed an amendment to the Sentencing Guidelines that would eliminate the distinction between crack and powder cocaine for purposes of establishing offense levels. See "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary," Amend. No. 5, submitted to Congress May 1, 1995. On October 30, 1995, Congress rejected the amendment. P.L. 104-38, Oct. 30, 1995, 109 Stat. 334.

Not only are the quantities of crack often small, the value in comparison with other drugs is nominal. A few dollars worth of crack will trigger a long sentence. Using data from the United States Drug Enforcement Agency, the Sentencing Commission determined that crack has a street value of approximately $38.33 per one-third gram ($105 per gram) compared to $107 per gram of powder cocaine. Under the sentencing guidelines, $5,750 worth of crack results in an offense level 32, but $535,000 worth of powder cocaine is required to reach that offense level. A defendant would have to have over eight million dollars worth of marijuana, with a street value of $237.57 per ounce, to have a base offense level of 32. Other offense levels require similarly disproportionate values. Special Report at 173, Table 19.

Using the DEA comparative street values, $535,000 worth of powder cocaine and $5,750 worth of crack are the quantities (five kilograms of powder and 50 grams of crack) that trigger the mandatory ten-year prison terms under 21 U.S.C. § 841(b)(1)(A). The sentencing scheme for cocaine is thus unrelated to the profitability of trafficking as well as to the lack of significantly different properties in its various forms.

C. THE RACIAL DISPARITIES IN PROSECUTIONS

1. Despite the fact that African-Americans total 12% of this nation's population, 92% of federal crack prosecutions nationwide have involved African-American defendants. See 1992 U.S. Sentencing Commission Monitoring Data Files (April-July 1992); Special Report, Ch. 7. Figures 1 and 2 compare African-Americans in the general population and those charged with crack offenses, infra p. 12.

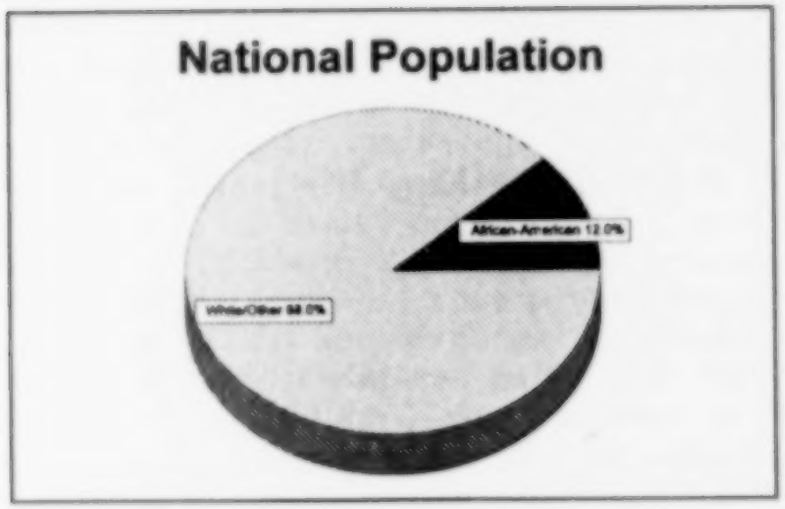

Figure 1

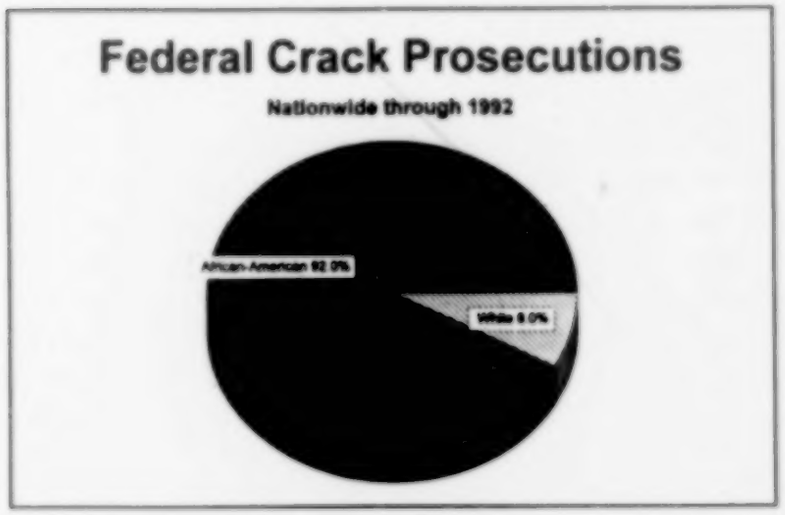

FIGURE 2

The racial disparities in prosecutions cannot be explained by the argument that crack is "an African-American drug" in light of the fact that whites use crack in significant numbers. One survey concluded that 65% of crack users were white. Special Report at 39.

Large scale dealers, both black and white, keep cocaine in powder form until it is ready to be sold.

See, e.g., Commission Hearings at 38 (testimony of Sergeant Brennan) ("[y]ou don't see very much powder on the street at all, no. The powder is made into crack and distributed on the street. . . . It all comes from the same source; the powder."). It is the small scale street dealer, not the large scale dealer, whether Caucasian or African-American, who is arrested on the street. Id.

The use of crack cocaine does not depend on race, but rather on place of residence and neighborhood-level social and environmental conditions. When such conditions are held constant, the pattern of crack use does not differ significantly with race. Special Report at 39.

The national statistics for federal crack prosecutions are mirrored by prosecutions in individual districts. The Eastern District of Washington provides a stark example. In that district, African-Americans comprise approximately one percent of the population, but the percentage of African-American federal crack defendants continues to reflect the national percentage of over 90%. Of 43 crack prosecutions from 1992 to 1994, 39, or [90.7%], were African-American. Only four, or 9.3%, were white. Figure 3, infra p. 14, charts the racial composition of federally prosecuted crack offenders in the Eastern District of Washington.[4]

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[4]These statistics were submitted to the District Court during the course of proceedings in United States v. Barnes, CR-92-046-WFN (E.D. Wash.), United States v. Dumas, CR-93-038-FVS (E.D. Wash.), and United States v. Fraiser, CR-93-039-WFN (E.D. Wash.). Each of the defendants in these cases argued the statutes and guidelines governing crack are unconstitutional as enacted and that law enforcement and prosecutors selectively select defendants on a racial basis.

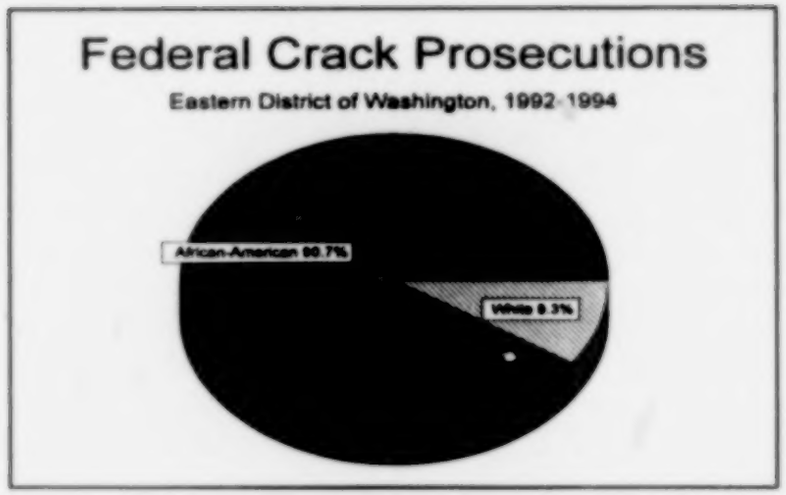

FIGURE 3

Federal prosecutions in other districts reflect that similarly disproportionate numbers of African-Americans are prosecuted for crack offenses. Of 193 prosecutions in the Southern District of California from 1988 to 1993, 168, or 87.1%, of crack defendants were African-American. Cubans of African descent accounted for 12, or 6.2%, of the defendants. One defendant, 0.5%, was Jamaican of African descent. Hispanics numbered 11, or 5.7%. Minorities thus totaled 99.5% of the defendants, while only one defendant, 0.5% of the total was white.[5] The statistics from the Southern District of California are shown in Figure 4, infra p. 15.

[5]Data submitted in United States v. Reese, CR-93-817 (S.D. Cal.). As in the cases from the Eastern District of Washington, the defendants in Reese, argued, *inter alia*, that crack statutes were selectively prosecuted.

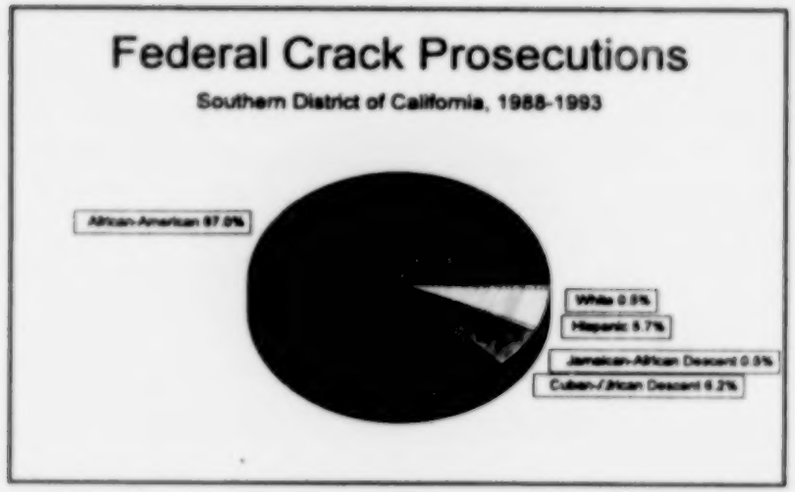

FIGURE 4

In the District of Colorado, of 85 federal crack defendants, 72, or 84.7% were African-American; 6, or 7.1%, were white; and 7, or 8.2% were Hispanic, other, or of unknown race.[6] See Figure 5.

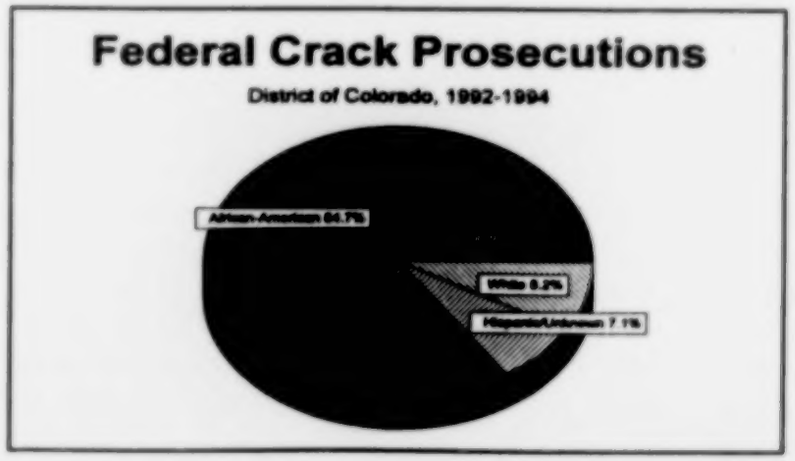

Figure 5

[6]These statistics were submitted in United States v. Ford, 94-CR-124-2 (D. Col.).

Possibly more relevant here are additional statistics in the Central District of California, the same district where the case before the Court arose.[7] Prosecution statistics showed that of 149 defendants who were charged as part of crack cocaine sting operations, 109 (74.7%) were African-American, 28 (19.2%) were Hispanic, 8 (5.5%) were Asian and 1 (0.7%) was white. See Figure 6.

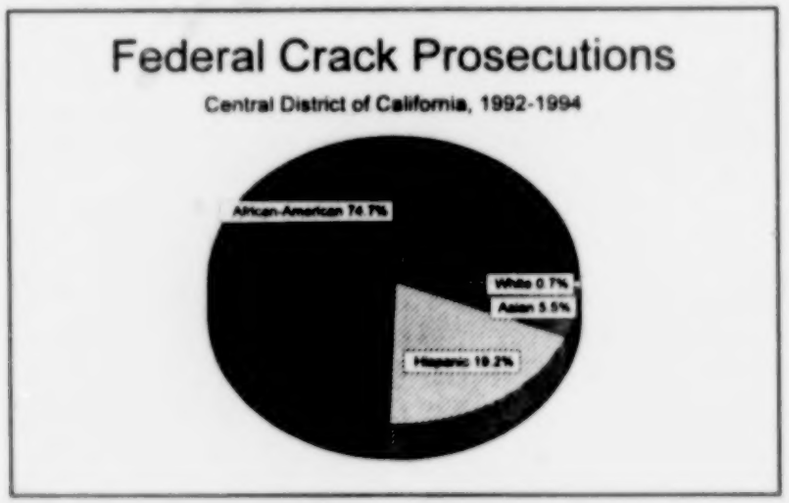

Figure 6

Statistics from two state jurisdictions support the conclusion that more whites are available for prosecution than are prosecuted in federal court. In the Eastern District of Washington, data showed that in state prosecutions in Spokane County, the most populous county in the district, whites accounted for 82, or 28.9%, of 284 crack prosecutions, while African-Americans comprised 193, or 68.0% of the defendants.[8] This data is summarized in Figure 7, infra p. 17.

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[7]This data is taken from United States v. Turner, 901 F. Supp. 1491 (C.D. Cal. 1995).

[8]See supra at n.4.

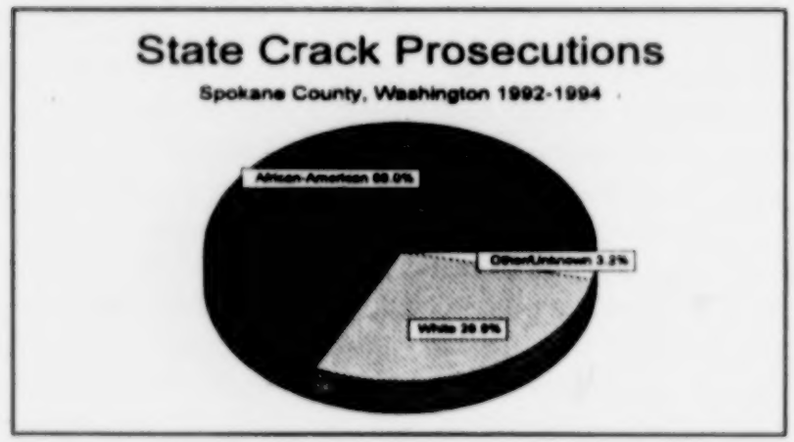

Figure 7

Similarly, as shown in Figure 8, 552, or 19.6%, of 2661 crack defendants in state courts within the Southern District of Florida were white.[9]

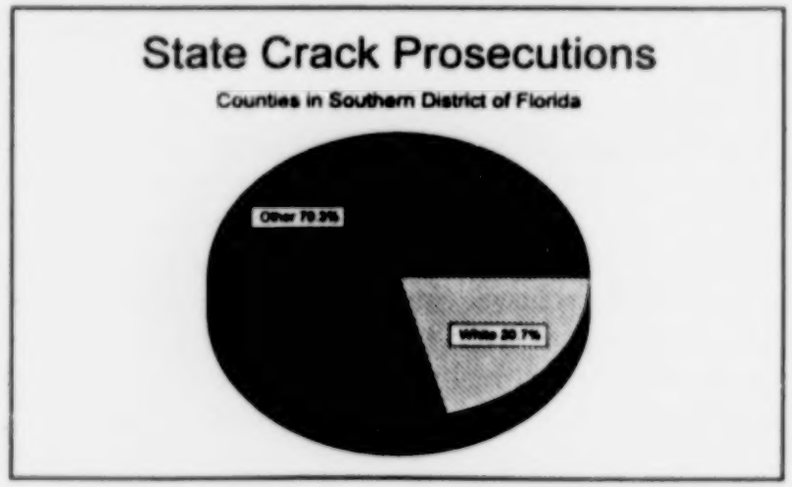

Figure 8

Obviously, crack offenses are not the province of African-Americans to the extent indicated by federal prosecutions.

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[9]This data was filed in United States v. Hickman, CR-93-14021 (S.D. Fla.).

This federal and state data shows the marked disproportionality with which African-Americans are prosecuted, convicted and sentenced for crack offenses in federal court. Attempts to explain the disparity between population figures and prosecutions by claims that African-Americans commit crack offenses more than whites cannot explain the gross differences. This is particularly true in light of the evidence that whites commit crack offenses in significant numbers, certainly far greater than the federal prosecution data would indicate.

2. In some cases, the government has attempted to explain the statistical disparities in the racial makeup of federal crack defendants by stating that several criteria are involved in decisions on whether to prosecute federally. According to the government, these criteria include quantity, a defendant's gang membership or affiliation, and whether firearms were involved in the offense. See, e.g., United States v. Dumas, 64 F.3d 1427, 1431 (9th Cir. 1995); United States v. Turner, 901 F. Supp. 1491, 1494 (C.D. Cal. 1995). However, as noted in Turner, these factors may not be race neutral. Introduction of the "gang" factor does nothing to refute a claim of selective prosecution. Blacks are often seen as gang-affiliated on the basis of no real evidence at all. Turner, 901 F. Supp. at 1497 (gang membership is known to be race related); see also New York Times, Dec. 11, 1993, Sect.1, p. 8 ("2 of 3 Young Black Men in Denver Listed by Police as Suspected Gangsters").

D. RESPONSES TO ATTACKS ON CRACK PROSECUTIONS AND SENTENCING

Numerous defendants nationwide have attacked the crack cocaine sentencing structure. They have claimed that the statutes and guidelines are unconstitutional as enacted because they violate

equal protection, due process, and the Eighth Amendment.

Many defendants have cited the process by which the statutory penalties were enacted as evidence that a discriminatory purpose was at the foundation of the statute and that the grossly disproportionate federal prosecution rates between African-Americans and Caucasians was a foreseeable and desired effect of the legislation. See, e.g., United States v. Dumas, 64 F.3d 1427 (9th Cir. 1995); United States v. Clary, 846 F. Supp. 768 (E.D. Mo.), rev'd, 34 F.3d 709 (8th Cir. 1994).[10]

Additionally, many defendants have cited prosecution statistics similar to those discussed in the previous section to support arguments that investigation, arrest, and prosecution decisions are racially biased. See Part I, Section C, Figures 1-6.

These claims by various defendants have been almost universally rejected by the courts. Some district courts have ruled in favor of defendants. See United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994) (crack penalties violate spirit of equal protection), rev'd, 34 F.3d 709 (8th Cir. 1994); United States v. Davis, 864 F. Supp. 1303 (N.D. Ga. 1994) ("cocaine base" and "cocaine" are identical and Congress established two penalties for the same

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[10]See 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("most of the dealers, as with past trends, are black or Hispanic"). The Congressional Record regarding this legislation is replete with references to its goal of targeting minority communities through this legislation. See, e.g., Crack Cocaine: Hearing Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Cong., 2d Sess., at 58 ("the seller we see is Haitian or black"); 132 Cong. Rec. S809 (daily ed. June 20, 1986) ("the ghetto's legion of unemployed teenagers"); 132 Cong. Rec. S4670 (daily ed. April 22, 1986) ("whites rarely sell the cocaine rocks"). The assertion that whites are not involved in crack offenses is untrue. See supra, Part I, Section C.

substance). Courts of appeals have consistently rejected these claims. The courts have uniformly held that defendants have failed to meet their burden in establishing selective and discriminatory enforcement and prosecution. See, e.g., United States v. Dumas, 64 F.3d 1427 (9th Cir. 1995); United States v. Clary, 34 F.3d 709 (8th Cir. 1994). As with claims that the statute and guidelines themselves are unconstitutional, no court of appeals has held that a defendant was the victim of racially motivated selective enforcement or prosecution.

II. THE EVIDENCE OF SELECTIVE PROSECUTION IS MORE THAN SUFFICIENT TO REQUIRE DISCOVERY OF THE PROCESS AND REASONS FOR PROSECUTORIAL DECISIONS.

As discussed at Part I, Section C, supra, defendants in the instant case submitted statistical data showing a stark racial disparity in prosecutions of crack offenses in the Central District of California. In all of 1991, not one white defendant in this large district was prosecuted federally for a crack offense.

1. Courts have ruled against defendants who have brought claims of selective enforcement and prosecution, finding the claimants failed to provide sufficient proof of their claims. Here, the defendants have sought discovery in order to provide the missing evidence to support their claim. As Judge Reinhardt succinctly framed the issue in dissent in the panel opinion, later withdrawn, "If they could make such a showing without any discovery, there would be no need for discovery in the first place." United States v. Armstrong, 21 F.3d 1431, 1439 (9th Cir. 1994) (Reinhardt, J., dissenting).

A threshold issue in determining whether the discovery order was appropriately entered is the test for determining when discovery is generally

appropriately ordered. A majority of the circuits have adopted the "colorable basis" test. See, e.g., In re Grand Jury, 619 F.2d 1022, 1030 (3d Cir. 1980); United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990); United States v. Armstrong, 48 F.3d 1508, 1512 (9th Cir. 1995) (en banc); United States v. P.H.E., Inc., 956 F.2d 848, 860 (10th Cir. 1992); Attorney General of the United States v. Irish People, Inc., 684 F.2d 928, 948 (D.C. Cir. 1982). A colorable basis is "some evidence tending to show the essential elements of the claim." Heidecke, 900 F.2d at 1159.

Four circuits apply a stricter "prima facie showing" test. United States v. Penagarican-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. Germain v. United States, 840 F.2d 1087, 1095 (2d Cir. 1985); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994).

Finally, two circuits have employed a "non-frivolous" standard. United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1988).

A defendant in a federal case faces the many resources of the United States government. Although the principles of presumption of innocence and proof beyond a reasonable doubt guide the criminal justice system, a defendant is often placed in a position of greatly inferior power compared to that of the government. Considering the vastly differing resources of the parties and the enormous consequences to the accused, and where the data is as stark as it is here, the test for discovery orders should not place an undue onus on defendants.

The government argues that a defendant should be required to make a "substantial" or "significant"

showing of selective prosecution before discovery is permitted. In effect, the standard proposed by the government would require defendants to prove their claim before even being permitted basic discovery. The government's argument, if accepted, would allow prosecutors unfettered discretion at the same time that meaningful review of potential abuses of that discretion is effectively foreclosed.

Regardless of how the test for discovery is formulated, the overwhelming statistics submitted by the defendants in this case surpass even the most stringent of tests. The assertion by the government that there has been no showing of similarly situated defendants not being prosecuted is without merit. The statistical disparities discussed in Part I permit, if not mandate, an inference of the existence of a potential pool of defendants in which whites are represented in far greater numbers than reflected by federal crack prosecutions. Evidence that whites use and deal crack and the fact that state court prosecutions of whites are significantly greater than federal prosecutions supports the inference. This reasonable inference should shift the burden to the government to come forward, through discovery, with information concerning its investigative and prosecutorial practices.

2. To the extent that the evidence as presented does not support an inference of selective prosecution, any evidentiary gaps can be filled only by the government. Only law enforcement and prosecutors have the relevant and necessary information concerning investigations and decisions to prosecute.[11] Any additional relevant proof is

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[11]Only law enforcement agencies would know what communities are targeted, which suspects are arrested and which are released. Indeed, federal prosecutors may not see the number of whites investigated or arrested but not presented for federal prosecution. Nonetheless, information concerning investigations or arrests would certainly be available to

only in the hands of the government. Justice requires that the government be compelled to provide the information.

3. The government's argument that requiring discovery in crack cases would open the floodgates to claims of selective prosecution in other offenses is also without merit. First, no other offenses, whether drug-related or not, are comparable to crack offenses for which defendants face draconian punishments as compared to other offenders involved with essentially the same drug. Second, the government should not be permitted to shield itself from accountability for its decisions in one arena by the possibility that scrutiny might lead to discovery of constitutional violations in other arenas.

The discovery process would not, as the government claims, be onerous. The Department of Justice and individual United States Attorneys know what the policies and procedures are that guide the decisions to prosecute. They know what criteria are used to make those decisions. And they have, or could easily obtain from law enforcement, information concerning similarly situated persons who have not been arrested or presented for federal prosecution. A meaningful response from the government would permit the judicial branch to make a more reasoned decision and would not have to be duplicated with each challenge as the government appears to argue.

Assuming that the racial disparities in federal crack prosecutions are accidental outgrowths of legitimate criteria, the government might well be asked why it is so reluctant to share that criteria.

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prosecutors. The same information is not available to defendants.

If, as many defendants have claimed, the disparities are due to improper selection, the government must be required to cease those practices.

This Court has stated that statistical disparities can provide "for all practical purposes" a "mathematical demonstration" of intent to discriminatorily enforce and prosecute violations See Gomillion v. Lightfoot, 346 U.S. 339, 341 (1960). The statistics here must surely be sufficient for the preliminary step of discovery.

CONCLUSION

For the foregoing reasons, the en banc judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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